

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 308 OF 2011

1. Smt. Manorama Manohar Kauthankar
2. Shri Nagesh M. Kauthankar
Both residing at Tikahazan, Mayem,
Bicholim, Goa. Petitioners

V e r s u s

Konkan Railway Corporation Ltd.
Margao Railway Station,
Rawanfond, Margao, Goa. Respondents

Mr. Prasheen Lotlikar, Advocate for the Petitioners.

Mr. E. Afonso, Advocate for the Respondents.

Coram :- **M. S. SONAK, J**

Date : **12th May, 2017**

ORAL JUDGMENT

Heard Mr. Prasheen Lotlikar, learned Counsel appearing for the
Petitioners and Mr. E. Afonso, learned Counsel appearing for the Respondents

2. The challenge in this Petition is to the Judgment and Award dated
30.10.2004 made by the Second Addl. District Judge, Panaji, (Reference Court),
dismissing the Reference Application no. 1/2000 under Section 15(1) of the Indian
Railways Act, 1989, ('the said Act').

3. The Petitioners claim that they have a house/Bakery in the property bearing survey no. 255/2 of Village Mayem, Bicholim, Goa and that at a distance of hardly few metres from their residential house, the Respondent has laid railway tracks for the purpose of Konkan Railway. As a result of the operations undertaken by the Respondents at the site of laying such tracks, it is the case of the Petitioners that their house/ Bakery suffered extensive damage for which they are entitled for compensation to the tune of Rs.2,00,000/-. It is also the case of the Petitioners that the house/Bakery will possibly not survive even repairs and reconstruction might be necessary requiring additional expenditure of Rs.2,00,000/-. The claim of compensation of Rs.2,00,000/- or the claim for compensation for reconstruction of the house/Bakery of Rs.4,00,000/- is stated to be in the alternate though the Petitioners are not quite clear on this aspect.

4. The Petitioners have also claimed that on account of dumping of mud and other construction material in front of their house/Bakery for a period of about eight days, it was not possible for the Petitioners to deliver the Bakery products to the customers. The Rickshaw/transport that delivers such material could not be brought anywhere close to the house/Bakery. As a result of this, the Petitioners claim compensation to the extent of Rs.78,500/-.

5. The Petitioners after issuance of notice under Section 80 of the Civil Procedure Code had initially instituted a Civil Suit no. 43/1995/A in the Court of the Civil Judge, Senior Division at Bicholim seeking compensation as aforesaid. By Order dated 06.11.1998, however, the learned Trial Judge dismissed the

preliminary objections raised by the Respondents to the maintainability of the Suit. The Respondents instituted a Civil Revision Application no. 51/1999 before this Court to question the learned Trial Judge's Order dated 06.11.1998. The Revision Petition was disposed of by this Court by its Order dated 22.10.1999 by recording the statement that the Suit would be withdrawn and a reference could be made before the District Court under Section 15(1) of the said Act for determination of compensation, if any, payable to the Petitioners. Accordingly, reference was made to the Reference Court being Reference Application no. 1/2000.

6. The Petitioners in pursuance to the liberty granted, presented their claim in the Civil Suit as their claim before the Reference Court. The Respondents filed their response denying the liability to pay any compensation.

7. Based upon the pleadings, the Reference Court on 28.03.2002, framed the following Issues :

(1) Whether the Applicant prove that the cracks to the walls of the suit house developed while the laying of the railway tracks and in pre-laying operations which accompanied blasting, boring and excavation ?

(2) Whether the Applicants prove that on account of excavation and digging of valleys in front of suit house across the passage, the Applicants' way is blocked thereby making it impossible to take their Auto-rickshaw (which is means of transport of Bakery-products) out of the premises of the suit house ?

(3) Whether the applicants prove that their business of bakery suffered heavy losses and also damages were caused to their reputation and there were breaches of contract with their customers and that on account of the blockade they were prohibited for a week from supply of biscuits and other products to the customers ?

(4) Whether the applicants prove that their house is rendered useless for residential purposes as well as for running bakery as there is every possibility of its collapse at any time ?

(5) Whether the applicants prove that the loss to them on account of said blockade and stoppage of business for a week or so, is Rs.78,500/- as estimated in paragraph 11 of the reference ?

(6) Whether the Applicants prove that the damages caused to their house are to the tune of Rs.2,00,000/- if the house is to be repaired and if it is to be reconstructed, the costs would be Rs.4,00,000/- ?

(7) Whether the Applicants prove that they are entitled to the reliefs as claimed ?

(8) Whether the Respondent proves that the cracks on the walls of the house were due to defective construction and non-curing of the same ?

(9) What relief ? What Order ?

8. The Petitioners in support of their claim examined in all five witnesses including Mr. Naguesh Kanunthankar, Applicant no. 2. The Respondents did not examine any witnesses.

9. The Reference Court, by the impugned Judgment and Award dated 30.10.2004, has dismissed the claims of the Petitioners, inter alia, by holding that the acts of damage attributable to the Respondent, do not stand established.

10. The Petitioners, initially instituted First Appeal no. 61/2005 before this Court in order to impugn the Judgment and Award dated 30.10.2004. However, after hearing the Respondent, the Appeal was dismissed as not maintainable by Order dated 05.10.2010. Liberty was granted to the Petitioners to file a Writ Petition in case it is permissible in law to do so.

11. The Petitioners, thereafter, instituted the present Writ Petition no. 308/2011 to question the impugned Judgment and Award dated 30.10.2004.

12. In this Writ Petition, a notice was issued to the Respondents on 10.06.2011 and the same was made returnable on 21.07.2011. On the returnable date, Mr. Afonso, learned Counsel, appeared and applied for some time and the matter was stood over to 11.08.2011. On 11.08.2011, this Court recorded that though Mr. Afonso had waived notice on behalf of the Respondents, he was absent and, accordingly, in order to grant an additional opportunity, the matter was stood over to 25.08.2011. On 25.08.2011, Mr. Afonso, appeared for the Respondents but

applied for time and the matter was stood over to 15.09.2011. On 15.09.2011, upon hearing the learned Counsel for the Petitioners and noting the absence of the learned Counsel appearing for the Respondents, Rule was issued in this Petition and the hearing was expedited.

13. The only purpose for adverting to the aforesaid is to note that on behalf of the Respondents, no objection was raised to the maintainability of the Petition despite afford of several opportunities by this Court at the stage of admission of the Petition itself.

14. Today, when the Petition was called out for final hearing, Mr. Afonso, learned Counsel appearing for the Respondents, has objected to the maintainability of the present Petition by submitting that a statutory finality has been accorded to the Award made by the Reference Court in terms of Section 15(1) of the said Act. Mr. Afonso, relying upon the decision of the Hon'ble Supreme Court in the case of ***Sadhana Lodh vs. National Insurance Co. Ltd & anr.*** reported in **(2003) 3 SCC 524**, submitted that in a case where remedy of Appeal has not been provided for against the Judgment and Order of the District Judge under the Motor Vehicles Act, 1988, the remedy available to the aggrieved person is to file revision under Section 115 of the Code of Civil Procedure before the High Court and not to institute a Petition under Article 227 of the Constitution of India. On this ground, Mr. Afonso submitted that this Petition be dismissed as not maintainable.

15. At this point of time, the objection raised by Mr. Afonso cannot be

accepted. The Petitioners have been claiming for compensation from the year 1995. They have instituted several proceedings in the matter of their claim for compensation. Most of such proceedings were defeated on basis of technical objections. At the stage when the First Appeal no. 61/2005 was disposed of by this Court on 05.10.2010, upon hearing the Respondents, liberty was granted to the Petitioners to institute a Writ Petition, no doubt, in case it was permissible in law to do so. Thereafter, the present Writ Petition was instituted and opportunities were granted to the Respondents to make their submissions even before Rule was issued. At that stage, no objection was raised to the maintainability of the Petition.

16. The objection with regard to availability of alternate remedy is not an objection that goes to the root of maintainability of proceedings under Articles 226 or 227 of the Constitution of India. Ordinarily, when efficacious and alternate remedies are available to the Petitioners, this Court as a matter of self imposed restriction, relegates the Petitioner to avail of the alternate remedy rather than exercise its extraordinary jurisdiction. It is well settled that the Petitioners will normally be not relegated to an alternate remedy long after the Petition has been admitted and has come up for final hearing.

17. That, apart, the alternate remedy as proposed by Mr. Afonso, is a Civil Revision Application under Section 115 of the Civil Procedure Code, which again would lie before this Court itself. At the highest, therefore, this Court can take into consideration the parameters of revisional jurisdiction in order to determine whether the impugned Judgment and Award warrants interference. However, there is no

case made up to dismiss this Petition as not maintainable at this point of time. Besides, there is also a difference between the scheme of the Motor Vehicles Act 1988 and the Railways Act 1989. For all these reasons, the preliminary objection raised by Mr. Afonso, learned Counsel, is rejected.

18. Mr. P. Lotlikar, learned Counsel appearing for the Petitioners submits that the Reference Court has failed to apply the correct test in a matter of this nature. He submits that the evidence on record was required to be assessed by the Reference Court on the touchstone of balance of probabilities and not on the touchstone of proof beyond reasonable doubt. He submits that the impugned Judgment and Award betrays perversity inasmuch as relevant and material evidence has been completely overlooked. He submits that Reference Court failed to notice that Respondents did not lead any evidence in the matter. He submits that in pursuance of notice under Section 80 of the Civil Procedure Code, an Engineer of the Respondent is stated to have visited the site and it was also the case of the Respondents that the said Civil Engineer had told the Petitioners that the cracks of the house were not attributable to the works of the Respondents. Mr. Lotlikar, learned Counsel appearing for the Petitioners, submits that if this was indeed the position, then the Respondents should have examined the said Civil Engineer. The non-examination of the said Civil Engineer who had witnessed cracks to the Petitioners' house amounts to withholding of evidence. Mr. Lotlikar, learned Counsel further submits that in such circumstances, Reference Court was duty bound to draw an adverse inference against the Respondent.

19. Mr. Lotlikar, learned Counsel, also submits that the claim of the Petitioners was most reasonable. The fact that the Petitioners took the trouble of instituting proceedings and examining so many witnesses who have more or less deposed consistently, indicates that the Petitioners' house/Bakery did suffer serious damage on account of works of the Respondents. He submits that the Petitioners have been forced to spend both time and money litigating for their most reasonable claims. In such circumstances, Mr. Lotlikar, submits that the impugned Judgment and Award is liable to be interfered because the Reference Court has failed to exercise jurisdiction vested in it or in any case, has acted in the exercise of its jurisdiction illegally and with material irregularity. Mr. Lotlikar, submits that even by applying the parameters prescribed under Section 115, this is a case where the impugned Judgment and Award warrants interference.

20. Mr. Afonso, learned Counsel appearing for the Respondents, has submitted that there is no evidence on record to connect the works of laying of railway track by the Respondents and the alleged damage to the house of the Petitioners. He submits that the Reference Court has properly appreciated the evidence on record, taken notice of the exaggerations and inconsistencies and even the falsities in the case of the Petitioners and rightly rejected the reference. He submits that it is inconceivable that the Respondents would lay a railway line only half metre from the Petitioner's house. He submits that there is no material produced by the Petitioners to indicate the position and condition of the house/Bakery prior to the commencement of the works. He submits that the house/Bakery was a structure constructed in mud and laterite stones and cracks in

the walls are on account of failure to undertake proper curing or use proper material. He submits that no gelatin was ever used nor blasting operations were carried out for laying down railway tracks. He submits that the witnesses produced by the Petitioners contradict themselves and, therefore, the reference was rightly rejected. Finally, he submits that the impugned Judgment and Award warrants no interference either in the exercise of extraordinary jurisdiction under Article 227 of the Constitution of India or Section 115 of the Civil Procedure Code.

21. Mr Afonso, learned Counsel, also submitted that the burden of establishing the claim was entirely on the Petitioners and the Petitioners having failed to discharge such burden, the Reference was rightly rejected. He submits that relevant witnesses like purchasers from the Bakery or customers from the Bakery were never examined by the Petitioners. He submits that the estimate submitted by the Petitioners witnesses are not at all realistic. In such circumstances, Mr. Afonso submits that the reference was rightly rejected and there is no case is made out to warrant interference in the impugned Judgment and Award.

22. The rival contentions now fall for determination.

23. There is no dispute whatsoever that the Respondents have laid railway tracks at a distance of 20 to 25 metres from the Petitioners house/Bakery. If the deposition of the Petitioner no. 2 is carefully perused, the Petitioner has not stated that rail tracks were laid half a metre away from the house/Bakery but that

works in relation to the laying of tracks and other incidental works were undertaken from a distance of about half metre from the House/Bakery. The Petitioner no. 2 (Aw.1) has deposed in some details regards the works undertaken by the Respondents. It is true that Aw.1 has made no reference to gelatin but he has made reference to certain blasting operations and has stated that the cracks in the house/Bakery has a direct nexus with such operations. He has also deposed that the Respondents have laid the tracks with the help of blasting, boring, excavation and for this purpose, have made use of heavy machinery. He has also deposed that the access to the house/Bakery was blocked for about eight days on account of extensive excavation done. During this period, there was neither any fresh supply of materials to the Bakery nor could the products from the Bakery be delivered despite Orders and commitments for delivery. Aw.1 has produced photographs along with negatives indicating the extent of damage to the house. Aw. 1 has also produced documents with regards the house/Bakery. Aw. 1 has also deposed to the extent of damages and has attempted to justify the compensation claimed under various heads.

24. The Respondents have cross examined Aw. 1. The cross examination mainly comprises of denials. No doubt, same questions were posed as to whether any accounts are available with regards to Bakery operation. Aw. 1 has replied that he was running a Bakery from the house and, therefore, he was not keeping any written accounts. It is to be noted that this is a typical Goan Bakery in a Village there is nothing unreasonable as such in non-maintenance of accounts.

25. In the course of cross examination of Aw.1, the following material has come on record :

“I say that after receiving notice u/s 80 CPC the engineer of respondent has visited at site. This was after about mor month. It is not true to sugg that the said Civil Engineer had told us that the cracks to the house were not due to the work of the respondent.”

26. From the aforesaid suggestions put forth by the Respondent, it is apparent that the Respondent received noticed under Section 80 of the Civil Procedure Code from the Petitioners seeking damages/compensation. Thereafter, the Engineer of the Respondent did visit the site after about a month from the date of the receipt of the notice. On behalf of the Respondents, a suggestion was put to Aw.1 that the Civil Engineer had told the Petitioners that the cracks to her house were not due to the works of the Respondents. From this, it is evident that even the Respondent does not dispute the existence of cracks to the house/Bakery. There is otherwise more than ample evidence on record to suggest that there were cracks to the house/Bakery. This suggestion, coupled with the submissions of Mr. Afonso that the cracks may be attributable to lack of curing or on account of impure material used for the construction of the house/Bakery atleast establishes that the house/Bakery had developed significant cracks.

27. Further, from the suggestion put to Aw.1, it is clear that the Civil Engineer was allegedly of the opinion that the cracks to the house were not due to the work of the Respondents but, for some other causes. In these circumstances, it

was incumbent for the Respondent to have examined the said Civil Engineer who is alleged to have visited the site a month after the receipt of the notice under Section 80 of the Civil Procedure Code. Considering the depositions of almost five witnesses i.e. Petitioner no. 2, his two neighbours, one Civil Draftsman and one Civil Engineer, there was more than ample evidence on record to establish that the house/Bakery had developed significant cracks. The witnesses have categorically deposed that it was on account of the works of the Respondents that such damage was sustained to the house/Bakery. All this material was more than sufficient for atleast the onus to shift upon the Respondent to make good their plea that the cracks to the house/Bakery was for reasons unconnected with the Respondent.

28. The Civil Engineer of the Respondent had allegedly visited the site within one month from the receipt of the notice under Section 80 of the Civil Procedure Code. In such circumstances, the Respondent was required to examine the Civil Engineer failing which the Reference Court was duty bound to draw an adverse inference against the Respondent. By withholding the evidence of the Civil Engineer, the Respondent has failed to produce on record the best evidence to establish that the damage to the house/Bakery was for reasons unconnected to the Respondent.

29. In any case, the evidence produced by the Petitioners on record was sufficient for the onus to shift upon the Respondent. The existence of cracks and damage to the house/Bakery is established. The fact that the Respondent had undertaken its works very close to the house/Bakery is also established. The fact

that heavy machinery was employed for such works is also established. If despite all this, the Respondent's plea that the damage to the house/Bakery has no nexus with the Respondent or Respondent's works at site, is to be accepted, then the Respondent should have lead some evidence to that effect. The onus had clearly shifted upon the Respondent by not leading any evidence whatsoever, the Respondent has failed to discharge such onus. In such circumstances, the Reference Court failed to exercise jurisdiction vested in it and incorrectly rejected the reference.

30. Aw. 2 and Aw.3 are the neighbours of the Petitioners, They have also deposed that damages were sustained to the house/Bakery on account of the works undertaken by the Respondent. Aw. 2 has made reference to gelatin but has frankly admitted that he had not seen gelatin being used,. However, Aw. 2 has made reference to blasting and he has stated that on account of the sound, he inferred that gelatin was used. There was really no reason to discard the evidence of Aw.2 in the manner in which the Reference Court has discarded simply because the witness admitted that he had not personally seen gelatin being used. Aw. 3 has made reference to blasting operations at a nearby hill and stated that it is for this reasons that the damage may have taken place to the Petitioners house. If the evidence is construed in its proper perspective, it cannot be said that there is some serious inconsistency between the statements of the witnesses atleast in so far as material particulars are concerned.

31. Aw. 4 was a Civil Draftsman whose services were requisitioned to

assess damages to the house/Bakery. Aw. 5 was Civil Engineer who was engaged as contractor to give estimates for repairs/reconstruction of the house/Bakery. Both these witnesses have stated that they have not only seen the cracks and the damages to the house but that such cracks and damages were on account of the blasting operations by the Respondents.

32. In exercise of supervisory jurisdiction or for that matter, revisional jurisdiction, interference is permissible when perversity in regard of findings of fact is involved. Perversity arises not merely where findings are rendered on basis of no evidence but perversity also arises where vital material evidence is completely overlooked or excluded from consideration. Similarly, perversity also arises where incorrect test, in the matter of appreciation of evidence is adopted. The Reference Court, in the present case, appears to have assessed the material on record applying the test of proof beyond reasonable doubt. In a matter of this nature, the correct test to be applied was the test of balance of probabilities. The application of incorrect test amounts to exercise of jurisdiction with material irregularity. Therefore, a case is made out to interfere with the impugned Judgment and Award in the exercise of either supervisory or revisional jurisdiction.

33. The material on record establishes that damage was sustained to the house/Bakery of the Petitioners on account of acts attributable to the Respondent. The specific plea raised by the Respondent that such damage was for reasons unconnected with the Respondent, may have been pleaded vaguely by the Respondent. However, the same has not at all been proved by the Respondent.

There is no material on record to establish that the cracks and the damage sustained to the house/Bakery of the Petitioners were for want of curing or the use of inferior materials. In fact, no evidence whatsoever has been produced on record by the Respondent, even though, the onus had clearly shifted upon the Respondent. The Petitioners had produced sufficient evidence on record to establish the damages to the house/Bakery and the nexus between such damages and the works/activities undertaken by the Respondent.

34. In so far as assessment of compensation is concerned, however, the Petitioners' contentions that the nature and extent of damages to the house/Bakery required reconstruction at the cost of over Rs.4,00,000/-, cannot be accepted. Instead, the material on record particularly in the form of the estimates submitted by Aw.4 and Aw.5 i.e. Civil Draftsmen and the Civil Engineer, suggests that compensation of Rs.2,00,000/- towards repairs and restoration of the house/Bakery, would be appropriate in the facts and circumstances of the present case. It is to be noted that the estimates submitted by Aw.4 and Aw.5 who were qualified to submit such estimates, appear to be reasonable in the facts and circumstances of the present case. Their depositions as regards such estimates have virtually gone unchallenged or unrebutted, save and except some suggestions and denials. The estimates submitted by these witnesses, in so far as repairs and restoration appears to be within the bounds of reasonability and therefore, deserves acceptance.

35. There is also more than sufficient material on record which

establishes that for about eight days, the Petitioners were unable to even use the access to their house/Bakery on account of the excavation works undertaken by the Respondents right in front of the Petitioners' house/Bakery. The Petitioner no. 2 and the two neighbours, who are quite natural witnesses, have deposed to this fact and such evidence has been unduly overlooked by the Reference Court. There is however, no material on record in support of the Petitioners' contention that the compensation on this count is required to be determined at Rs.78,500/-. From the material on record, particularly in the form of income and turnover of the Petitioners, it would be reasonable to assess the compensation on this count at Rs.25,000/-. This includes not only the loss of compensation and the consequent inconvenience but also compensation towards inability to honour the commitments for deliveries during the said period, idle payment to workers and wastage.

36. Accordingly, the Respondent is liable to pay compensation of Rs.2,25,000/- to the Petitioners. In addition, this is a fit case for imposition of costs upon the Respondents.

37. The material on record establishes that the Petitioners' house/Bakery has suffered damages on account of acts attributable to the Respondent sometime in the year 1995. As law abiding citizens, they promptly served a notice under Section 80 of the Civil Procedure Code upon the Respondent. The Respondent deputed an Engineer to inspect the site. Such Engineer noticed the damage but opined that the damage had no nexus with the activities undertaken by the Respondent nearby. The Respondent did not even bother to respond to the notice

thereby constraining the Petitioners to institute a Civil Suit. The Respondent objected to the maintainability of the Civil Suit and upon dismissal of the objection instituted a Civil Revision application in this Court. Only in the Civil Revision application, the Respondent made a statement that a reference would be made under Section 15 of the Railways Act 1989 which statement could have been made much earlier i.e. upon receipt of notice under Section 80 of the Civil Procedure Code or atleast upon the receipt of summons for settlement in the Civil Suit. After the reference was dismissed by the impugned Judgment and Award dated 30.10.2004, the Petitioners instituted First Appeal no. 61/2005 in this Court. The Respondents, it appears, did not immediately object to the maintainability of the Appeal, but after five years, when the Appeal was taken up for final hearing, the Respondent raised the plea that Appeal was not maintainable in view of the statutory finality to the Award of the Reference Court. Such objection was upheld by this Court in its Order dated 05.10.2010 and the Appeal was dismissed but liberty was granted to the Petitioners to institute a Writ Petition, if permissible in law. Despite service, the objection to the maintainability of the Writ Petition was never raised at the stage of admission of the present Writ Petition. However, when the matter was taken up for final hearing, almost six years after the admission of the Writ Petition, once again, issue of maintainability was raised by urging that the appropriate remedy would be a Civil Revision Application under Section 115 of the Civil Procedure Code and not a Writ Petition. The Petitioners have been pursuing their remedy right from 1995 on account of the unreasonable approach on the part of the Respondent. In these circumstances, it is appropriate to require the Respondents to pay costs of Rs.25,000/- to the Petitioners in addition to some

reasonable rate of interest upon the amount of compensation now determined.

38. Accordingly, the impugned Judgment and Award is set aside. Instead, by this Judgment and Award, the Respondents are directed to pay to the Petitioners the compensation of Rs.2,25,000/- along with interest thereon at the rate of 7% per annum effective from 30.10.2004 within a period of six weeks from today. Such compensation amount to be deposited in this Court within a period of six weeks from today. Upon deposit, the Petitioners shall be at liberty to withdraw the same unconditionally. In addition, the Respondent is directed to pay to the Petitioners costs of Rs.25,000/- within a period of six months from today. The amount of costs should also be deposited in this Court within a period of six weeks and upon deposit, the Petitioners shall be at liberty to withdraw the same unconditionally.

M. S. SONAK, J.

arp/*